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IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

CASE C-362/14

MAXIMILLIAN SCHREMS

WRITTEN OBSERVATIONS OF THE UNITED KINGDOM

The United Kingdom is represented by Jane Beeko of the Cabinet Office European Law Division, Treasury Solicitor's Department, acting as Agent, and by Josh Holmes, Barrister.

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05 November 2014

A. INTRODUCTION

1. Pursuant to Article 23 of the Protocol on the Statute of the Court of Justice of the European Union, the United Kingdom submits these Written Observations to the Court.
2. The case arises out of a reference for preliminary ruling made by the High Court of Ireland ('the Referring Court') on 17 July 2014, regarding the interpretation of Article 25(6) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data ('the Directive').
3. In the national proceedings, the Applicant, a user of the social networking website, Facebook, seeks to challenge a decision of the Irish Data Protection Commissioner ('the Commissioner'), the official whose office serves as the supervisory authority in Ireland for the purposes of Article 28 of the Directive, regarding Facebook's transfer of subscribers' data to servers located in the United States. The Applicant alleged that US law and practice did not ensure an adequate level of protection for the data, and that such transfers were therefore contrary to Article 25(1) of the Directive. The Commissioner rejected the Applicant's complaint partly on the basis of the European Commission's decision 2000/520/EC of 26 July 2000 ('the Decision') pursuant to Article 25(6) of the Directive, finding that the US does ensure an adequate level of data protection.
4. The Referring Court underlines that the Applicant does not purport to challenge the validity either of Article 25(6) of the Directive or of Commission decision 2000/520/EC: see paragraph 20 of the Order for Reference. The Referring Court specifically rejected as inappropriate an attempt by an intervener to expand the scope of the proceedings so as to include such a challenge: see paragraphs 28-29 of the Order for

Reference. The Referring Court's question expressly reflects those conclusions.

5. Instead, the Referring Court's question is one of interpretation: see paragraph 26 of the Order for Reference. The Referring Court essentially wishes to know whether the Directive should be interpreted, in the light of Articles 7, 8 and 47 of the EU Charter of Fundamental Rights ('the Charter'), as permitting or requiring supervisory authorities in the Member States to override a decision of the Commission pursuant to Article 25(6) of the Directive finding that a third country ensures an adequate level of data protection.
6. For the reasons set out below, the United Kingdom submits that supervisory authorities may not override a Commission decision pursuant to Article 25(6) in this manner. In summary:
 - a. The meaning of Article 25(6) is clear: Member States are required to comply with a decision of the Commission under that provision. No role or power is given to Member States or particular national bodies such as supervisory authorities. Any other interpretation would be *contra legem*;
 - b. The meaning of the Decision is equally clear. The Commission has found that an adequate level of data protection applies in the case of data transfers to the US by organisations self-certifying their compliance with the US Department of Commerce's Safe Harbor Privacy Principles, as set out in Annex I of the Decision; and that in implementing the Decision Member States' only powers are to suspend such data flows in limited, specified circumstances, which are not alleged to apply in the present case.

B. ANALYSIS

The meaning of Article 25(6) of the Directive

7. The second unnumbered sub-paragraph of Article 25(6) of the Directive provides that '*Member States shall take all the measures necessary to comply with*' a decision of the Commission made pursuant to the first unnumbered sub-paragraph of Article 25(6). The text of the provision therefore makes clear that Member States must act in accordance with, and may not depart from, the Commission's decision.
8. That interpretation of Article 25(6) is confirmed having regard to the objectives of the Directive:
 - a. The Directive aims to ensure equivalent protection for the rights and freedoms of individuals across the Union with regard to the processing of their data: see recital (8) in the Preamble of the Directive. The Commission's power to adopt decisions under Article 25(6) is one of the means by which such a common approach is guaranteed. If Member States were free to disregard the Commission's assessment and to substitute their own views as to the adequacy of data protection in third countries, the protection afforded to data processing rights would vary from country to country, undermining the transparency and confidence that are needed to underpin the free flow of data *within* the Union;
 - b. The Directive also aims to provide a stable and effective platform for the cross-border flows of personal data between the Union and third countries that are a necessary component for the expansion of international trade: see recital (56) of the Directive. The provision in Article 25(6) for the Commission to adopt binding decisions serves to ensure the Union's ability to

maintain a united front on the international stage, thereby enabling it to secure appropriate terms of trade in negotiations with third countries, including as regards data protection.

9. The meaning of Article 25(6) of the Directive is therefore clear and straightforward. It cannot be interpreted in such a way as to permit or require the authorities of the Member States to override a Commission decision taken pursuant to it. Any such interpretation would be contrary to the clear meaning of and purposes pursued by that provision, and would be *contra legem*. The Commission's power to assess the adequacy of the level of data protection acts as a protection of the rights of data subjects in the Union, as enshrined in the Charter.

The meaning of Decision 2000/520/EC

10. Given that, as above, the Directive provides no role for Member States or supervisory authorities to review a Decision made under Article 26(5) the only other place such a role might conceivably be provided for is in the Decision itself.
11. However on that point the interpretation of Decision 2000/520/EC is equally clear:
 - a. Article 1(1) embodies the Commission's finding that the US Department of Commerce's Safe Harbor Privacy Principles ('the Principles'), implemented in accordance with guidance provided by the accompanying 'frequently asked questions' document, ensures an adequate level of protection for personal data transferred from the EU to organisations established in the US.¹ The level of protection provided by those Principles is substantially similar to that conferred within the Union by the Directive and the national legislation which implements it;

¹ The Commission conducted a review of the Decision in 2013/14 and concluded that it continued to ensure adequate protection in the case of data transfers to the US.

- b. Article 1(2) and (3) provide that organisations receiving data must certify their adherence to the Principles and notify their commitment to the US Department of Commerce in order for a data transfer to them to fall within the scope of the Decision (a procedure known as 'self-certification');
 - c. Article 3 specifies the circumstances in which Member States may exercise their powers to suspend data flows to the US, namely:
 - i. where a government body in the United States finds that the Principles are being violated; or
 - ii. where the Member State considers, independently of any such finding, that there is a substantial likelihood that the Principles are being violated; there is a reasonable basis for believing that the enforcement mechanism is not suitable to deal with the case in an adequate and timely fashion; and where the competent authorities in the Member State concerned have made reasonable efforts to give notice to the organisation in question and an opportunity to respond;
 - d. Member States therefore retain the power to act in circumstances where such action is necessary to protect the rights of EU citizens as enshrined in the Charter. It is not alleged that the circumstances identified in Article 3 are of any application in the present case.
- 12. The Referring Court appears to accept that the effect of the Decision, if binding, is that the Irish supervisory authority was right to reject Mr. Schrems' complaint. The Referring Court does not itself propose any interpretation of the Decision whereby that conclusion could be avoided.

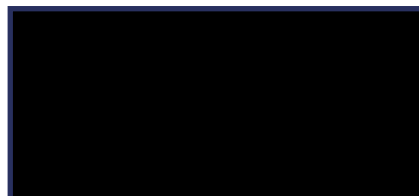
C. CONCLUSION

13. For the reasons set out above, the United Kingdom respectfully submits that the Court should answer the question referred as follows:

Where the Commission has adopted a decision pursuant to Article 25(6) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data, finding that a third country ensures an adequate level of protection the second unnumbered sub-paragraph of Article 25(6) must be interpreted as requiring the supervisory authorities of the Member States to comply with the terms of that decision.

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05 November 2014